

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

WEALTH TAX REFERENCE No 36 of 1983

For Approval and Signature:

Hon'ble MR.JUSTICE R.K.ABICHANDANI and
MR.JUSTICE R.BALIA.

=====

1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

COMMISSIONER OF WEALTH TAX

Versus

KASTURBHAI MAYABHAI

Appearance:

MR MJ THAKORE FOR MR MANISH R BHATT for Petitioner
MR MJ SHAH FOR MR JP SHAH for Respondent No. 1

CORAM : MR.JUSTICE R.K.ABICHANDANI and
MR.JUSTICE R.BALIA.

Date of decision: 29/01/97

ORAL JUDGEMENT

(Per Rajesh Balia,J)

1. By way of consolidated order in respect of assessment year 1968-69, 1971-72, 1972-73 and 1975-76,

the Income Tax Appellate Tribunal, Ahmedabad Bench 'B' had referred the following question of law, for the opinion of this Court arising out of its orders made in Wealth Tax Appeals Nos. 876, 877, 878 and 879 of 1981 at the instance of Commissioner of Wealth Tax:

"Whether on the facts and in the circumstances of the case, the Tribunal was right in law in holding that the assessee HUF did not have 7 annas share in the immovable and movable properties in the assessment years 1968-69, 1971-72, 1972-73 and 1975-76 and thereby cancelling the protective assessment?"

2. We may notice that Commissioner of Wealth Tax had required the Tribunal to refer only the following question arising out of its appellate order:

"Whether on the facts and in the circumstances of the case, the Tribunal was right in law in coming to the conclusion that the order of assessment made by the wealth-tax officer on a protective basis was liable to be cancelled?"

The Tribunal has thought it fit to reframe the question in the manner reproduced hereinabove. However, we are of the opinion, that the question suggested by the Commissioner is the only question that arises out of the Tribunal's order and the part which refers to the controversy about the status in respect of 7 annas share in the immovable and movable properties is concerned do not arise from the proceedings of the protective assessment as found by this Court in its decision in Wealth Tax Reference No. 34 of 1982 where for the assessment year 1969-70 and 1970-71. That part of question alone was referred to this Court and no question about protective assessment had been referred. This court pointed out that in the case of protective assessment the question of status of the share qua the share inherited from Mayabhai is only of academic importance and is not required to be decided. The extent of share inherited from Mayabhai is not at all in dispute in so far as protective assessment is concerned, rather that is the assumed premise on which protective assessment has been framed. However, since neither any question had been asked nor framed on the question of sustaining the protective assessment in the said reference, the Court had declined to answer the question referred to this Court having found it not required to be decided in those proceedings. We therefore shall reframe the question to be considered and answered by us as

suggested by the Commissioner in its application, as reproduced hereinabove.

3. Since, in the orders passed in this case by the Appellate Assistant Commissioner as well as the Tribunal the authorities have not stated the facts in detail but have rest contented with making reference to decision in other case relating to the same assessee, for fuller facts, we are adverting to the facts on the basis of the decision of this Court in Income Tax Reference No.344 of 1982 relating to the same assessee concerning the issue in question which has direct bearing on the present case.

4. The assessee Kasturbhai Mayabhai was regularly being assessed to the income tax since assessment year 1939-40 upto the assessment year 1965-66 and was also being assessed under the relevant provisions of Wealth Tax Act with effect from the date the Wealth Tax Act came into force. Until Assessment year 1965-66, the assessee was being assessed in respect of his income and wealth in individual status. From 1966-67 onwards, the assessee claimed that he has inherited properties from Manibhai and Mayabhai, two real brothers. The assessee was natural born son of Manibhai and was adopted to Mayabhai in the year 1919. It was also claimed by the assessee that Manibhai and Mayabhai both have inherited properties from their father Nathubhai Lalbhai under a will dated 21.12.1900. It is the further case of the assessee that Mayabhai inherited 7/16 share from his father while Manibhai had 9/16 share in the properties of said Nathubhai. All these property have been inherited by the assessee. The assessee claimed the status of HUF regarding the income derived from and value of the properties which he inherited from his adoptive father Mayabhai and claimed status of individual in respect of income derived from the properties and the value of such properties as he inherited from Manibhai or as reversioner of Manibhai's widow after her death. In respect of all these assessment years, the assessing officer held that all properties which the assessee had inherited from his adoptive father Mayabhai as well as Manibhai the natural father were held by him in his individual capacity.

5. While assessing the assessee under Wealth Tax Act in the status of individual capacity in all the properties inherited whether from Mayabhai or Manibhai, were included in his net wealth, the assessing officer also framed protective assessment in the hands of HUF as per returns filed by the assessee in that status. The assessee having aggrieved with the assessment in his

hands in individual status even in respect of properties inherited from Mayabhai appealed against the main order made in the status of individual and also as a protective measure appealed against the order made on protective basis as per his own return. The appellate Assistant Commissioner while affirming the assessment in the individual status allowed the appeal of the assessee for setting aside the protective assessment. The Tribunal affirmed the order of Appellate Assistant Commissioner about the status in respect of all the properties and in view thereof dismissed the revenue's appeal against order setting aside protective assessment by the Appellate Assistant Commissioner.

6. While the Income Tax Reference No. 344 of 1982 arose out of proceedings under Income Tax Appeal for the assessment year 1972-73 to 1976-77, Wealth Tax Reference No.39 of 1982 was referred to this Court in relation to assessment year 1967-68 to 1975-76 wherein the assessee was assessed in respect of his entire properties whether inherited from Mayabhai or Manibhai in individual status. In Wealth Tax Reference No. 39 of 1982, following question was referred:

"Whether on the facts of the case, the Appellate Tribunal was right in law in holding that (i) the self acquired property of Mayabhai did not on the adoption by his widow of a son become the joint property of the Hindu Undivided Family comprised of the widow, the adoptee, i.e., the assessee, and his wife and (ii) that the value of properties comprising seven annas share of the adoptee assessee was not hence assessable in the hands of the aforementioned HUF?"

By its decision dated 21.9.1995 in Income Tax Reference No.344 of 1982, the Court held that in the opinion of the court the Appellate Tribunal was not right in holding that the properties of Mayabhai on being inherited by his adopted son did not become the joint property of Hindu Undivided Family of mother and son and income arising from that property comprising seven annas share was not income of HUF but was assessable in the hands of the aforementioned HUF on the basis of Tribunal's decision dated 22.12.1995.

7. Following the decision in Income Tax Reference No. 344 of 1982, the question in Wealth Tax Reference No. 39 of 1982 was also answered in the like manner by the order dated 21.9.1995.

8. As a result of aforesaid decision, it is apparent that for assessment year 1967-68 to 1975-76 the assessment order in the individual status had remained confined to nine annas share in the properties inherited from Manibhai by the assessee in terms of order in Reference and the remainder of property to the extent of seven annas share inherited from Mayabhai had to be assessed in the hands of HUF as per the assessee's own return.

8. Since the very premise of the making of protective assessment is that it becomes effective only if the main assessment order is not sustained, the fate of protective assessment and its operativeness depends on the ultimate decision in the main order. It is to be made clear that at no point of time both the assessment orders simultaneously operate so as to result in double taxation. Since the protective nature of assessment order made by the Wealth Tax Officer initially, the correctness of which on the merit was nowhere challenged, and the question only related to the dispute about the status in which the assessee has to be assessed, was dependent on the continued existence of the main assessment order, there is no real necessity of filing appeals against protective assessment order when it was not subject to challenge on the merit of the wealth assessed under that order.

In Lalji Haridas v. ITO (1961) 43 ITR 387 the Supreme Court approved the practice of proceeding against two person simultaneously as protective measure where it was not clear to whom out of the two persons income belonged, making it clear that ultimately liability only against such person will be sustainable, who is found liable.

The practice concerning protective assessment was thus stated by Calcutta High Court in Jagannath Hanumandas vs. I.T.R.O. reported in (1957) 31 ITR 603:

"Though there is no provision in the Indian Income-tax Act authorising the levy of income-tax on a person other than "the assessee", i.e., the person by whom the income-tax is payable, it is open to the Income-tax authorities to make a "protective" or "alternate" assessment where owing to litigation between the parties concerned, in the civil Courts, or for other reasons, the person who is really liable to pay the tax cannot be finally determined by the Income-tax authorities, and unless such

alternative or protective assessment is made proceedings for assessment against the party ultimately found to be liable may become time-barred.

But, though such protective or alternate assessment is permissible, a protective recovery of tax is not permissible, that is to say, the Income-tax authorities cannot proceed to recover the tax in respect of the same income from both persons."

We are in respectful agreement.

The position in the present case if the assessment order made in the status of individual would have remained operative, the order passed in the status of HUF would remain dormant not to be operated and at any time if the order in the case of individual status was modified qua status the order would become operative so as to enforce tax payable under that order.

9. As the situation now stands from the facts noticed above that the main order in respect of individual status concerning seven annas share in the property inherited by the assessee from Mayabhai has been found to be unsustainable; the orders in question would become operative so as to give effect to the returns filed by the assessee himself.

10. In view of the discussion held above, we answer the question in negative, that is to say, in favour of the revenue and against the assessee. No order as to costs.